Micro Nutrition Specialties Sdn Bhd v RHB Bank Bhd

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO 22NCVC-36–01 OF 2016
ROZANA ALI JC
27 FEBRUARY 2017

Banking Law — Cheques — Payment of cheque — Plaintiff drew two cheques in favour of Ultimate Palms Sdn Bhd ('UPSB') — Defendant bank collected cheques and credited in UPSB's account — Proceeds of cheques withdrawn by third party — UPSB did not receive proceeds of cheques — Plaintiff sued defendant for tort of conversion and alternatively for money had and received — Whether defendant negligent in opening of UPSB account that resulted in loss to plaintiff — Whether defendant entitled to complete defence under s 85 of the Bills of Exchange Act 1949

The plaintiff drew two Maybank Bhd cheques in favour of Ultimate Palms Sdn Bhd ('UPSB') for the supply of red palm oil. The two cheques were posted to UPSB business address and subsequently, on 7 October 2011, an account was opened at the defendant's branch in Shah Alam under the name of UPSB ('UPSB account'). The two cheques were then handed for collection by the defendant and the UPSB account was credited with the proceeds of the two cheques. The proceeds of both cheques was withdrawn from the UPSB account and as at 2 February 2016, the remaining balance was only RM558.87. Problem arose when the plaintiff found that neither the two cheques nor the monies from the proceeds of the two cheques collected by the defendant went to UPSB. Consequently, the plaintiff brought the present action against the defendant premised on the tort of conversion for damages amounting to RM1,179,997.47; and alternatively, for money had and received for the similar amount, interest and cost ('the plaintiff's claim'). The issues for court's decision were: (a) whether the defendant was negligent in opening of the UPSB account that had resulted in loss to the plaintiff; and (b) whether the defendant was entitled to a complete defence under s 85 of the Bills of Exchange Act 1949 ('the Act').

Held, dismissing the plaintiff's claim with costs of RM20,000:

(1) Based on the evidence and circumstances of the case, since there had been no delivery of the two cheques to the payee, the plaintiff, therefore, remained as the true owner and was entitled to maintain the action (see paras 10 & 12).

(2) In the present case, the two cheques were not a forged document and

were issued in the name of UPSB and were cleared for payment by the paying bank with proceeds collected by the defendant. There was nothing to alert the defendant that UPSB was not the payee or rightful owner of the two cheques and the defendant had no knowledge that the UPSB account was opened by a customer who had no authority to do so. Further, all other documents in support presented for the opening of UPSB account were not disputed as to their authenticity and originality. There was also no evidence that the defendant had converted the two cheques to its use and wrongfully deprived the plaintiff of the same. Therefore, the plaintiff was not entitled for damages in compensation for the tort of conversion (see para 26).

(3) The plaintiff had not established in evidence that the defendant had, or could have had, any knowledge whatsoever as to the fraudulent means in the opening the current account and the withdrawal of the monies from the said account. In the absence of knowledge on the part of the defendant, natural justice and equity would not require the defendant to refund the plaintiff. Due to the fraud perpetrated by the imposter of the director of UPSB, the benefit of the fraud committed had passed to the imposter. Requiring the defendant to compensate the plaintiff now would be unjust to the defendant. In conclusion, the defendant had not been unjustly enriched at the expense of the plaintiff and the plaintiff had thus not made out its claim in moneys had and received (see para 28).

(4) It was crucial that the defendant's act must be done in good faith before s 85 of the Act could be invoked. Applying the principle of law to the facts of the case, the court found on the balance of probabilities that the defendant had discharged its burden in proving that it had acted in good faith and without negligence and therefore was entitled to a complete defence under s 85 of the Act (see paras 19 & 30).

[Bahasa Malaysia summary

Plaintif mengeluarkan dua cek Maybank Bhd atas nama Ultimate Palms Sdn Bhd ('UPSB') bagi pembekalan minyak sawit merah. Kedua-dua cek tersebut diposkan kepada alamat perniagaan UPSB dan kemudiannya, pada 7 Oktober 2011, akaun dibuka di cawangan defendan di Shah Alam di bawah nama UPSB ('akaun UPSB'). Kedua-dua cek kemudiannya diserahkan untuk kutipan oleh defendan dan akaun UPSB dikreditkan dengan hasil kutipan kedua-dua cek tersebut. Hasil kutipan kedua-dua cek dikeluarkan daripada akaun UPSB dan pada 2 Februari 2016, baki yang tinggal hanya RM558.87. Masalah berbangkit apabila plaintif mendapati bahawa tidak kedua-dua cek ataupun wang daripada hasil kutipan kedua-dua cek yang dikutip oleh defendan dibayar kepada UPSB. Akibatnya, plaintif membawa tindakan ini terhadap defendan berdasarkan atas tort penukaran untuk ganti rugi berjumlah sebanyak RM1,179,997.47; dan secara alternatif, untuk wang yang

ada dan telah diterima bagi jumlah yang sama, faedah dan kos ('tuntutan plaintif'). Isu-isu untuk keputusan mahkamah adalah: (a) sama ada defendan cuai dalam membuka akaun UPSB yang menyebabkan kerugian kepada plaintif; dan (b) sama ada defendan berhak untuk menyiapkan pembelaan di bawah s 85 Akta Bil Pertukaran 1949 ('Akta').

Diputuskan, menolak tuntutan plaintif dengan kos sebanyak RM20,000:

(1) Berdasarkan keterangan dan keadaan kes, memandangkan tidak terdapat penyerahan kedua-dua cek tersebut kepada penerima, plaintif, oleh itu, kekal sebagai pemilik sebenar dan berhak untuk mengekalkan tindakan tersebut (lihat perenggan 10 & 12).

(2) Dalam kes ini, kedua-dua cek tersebut bukan dokumen yang dipalsukan dan dikeluarkan atas nama UPSB dan diluluskan untuk bayaran oleh bank pembayar dengan hasil kutipan yang dikutip oleh defendan. Tidak ada apa-apa untuk memberitahu defendan bahawa UPSB bukan penerima atau pemilik sah kedua-dua cek dan defendan tidak mempunyai pengetahuan bahawa akaun UPSB dibuka oleh pelanggan yang tidak mempunyai kuasa untuk berbuat sedemikian. Selanjutnya, kesemua dokumen menyokong yang dikemukakan untuk membuka akaun UPSB tidak dipertikaikan terhadap kesahihan dan keasliannya. Juga tidak terdapat keterangan bahawa defendan telah menukar kedua-dua cek dan secara salah menafikan plaintif terhadapnya. Oleh itu, plaintif tidak berhak kepada ganti rugi sebagai pampasan untuk tort penukaran (lihat perenggan 26).

(3) Plaintif tidak membuktikan dalam keterangan bahawa defendan telah, atau boleh mempunyai apa-apa pengetahuan terhadap cara penipuan dalam pembukaan akaun semasa dan pengeluaran wang daripada akaun tersebut. Dalam ketiadaan pengetahuan oleh defendan, keadilan semulajadi dan ekuiti tidak akan memerlukan defendan untuk membayar balik kepada plaintif. Akibat fraud yang dilakukan oleh penipu pengarah UPSB, faedah fraud yang dilakukan telah dilepaskan kepada penipu. Mengkehendaki defendan untuk sekarang membayar plaintif akan menjadi tidak adil kepada defendan. Kesimpulannya, defendan telah tidak diperkaya secara tak adil sehingga menjejaskan plaintif dan plaintif oleh itu tidak membuat tuntutannya dalam wang yang ada dan telah diterima (lihat perenggan 28).

(4) Ia adalah penting bahawa tindakan defendan mesti dilakukan secara suci hati sebelum s 85 Akta boleh dibangkitkan. Mengguna pakai prinsip undang-undang kepada fakta kes, mahkamah mendapati atas imbangan kebarangkalian bahawa defendan telah melepaskan bebannya dalam membuktikan yang ia telah bertindak dalam suci hati dan tanpa cuai dan oleh itu berhak untuk menyiapkan pembelaan s 85 Akta (lihat perenggan

19 & 30).]

Notes

For cases on payment of cheque, see 1(3) *Mallal's Digest* (5th Ed, 2015) paras 2822–2826.

Cases referred to

Affin Bank Bhd v Successcom Enterprise Sdn Bhd [2009] 1 MLJ 36, CA (refd)
Anika Insurance Brokers Sdn Bhd & Anor v Public Bank Bhd [2004] 6 MLJ 268, HC (refd)
Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd [1942] 2 All ER 122, HL (refd)
Hamizan bin Abd Hamid v Wong Kok Keong & Anor [1994] 3 MLJ 630, HC (refd)
Indian Overseas Bank v Industrial Chain Concern 1989 SCR Supl (2) 27; 1990 SCC (1) 484, SC (refd)
Magna Prima Bhd & Ors v Top Green Entity Sdn Bhd & Ors [2013] 8 MLJ 447, HC (refd)
Oriental Bank of Malaya v Rubber Industry (Replanting) Board [1957] 1 MLJ 153; [1957] 1 LNS 50, CA (refd)
The official assignee of the property of Loh Chuk Poh, a bankrupt v The Oversea Chinese Bank Limited [1934] 1 MLJ 76 (refd)
United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd [1993] 1 MLJ 182; [1993] 2 CLJ 31, SC (refd)
United Malayan Banking Corp Bhd v Kek Tek Huat (deceased) (Kik Chon Lam & Ors, executors of the estate of Kek Tek Huat) [1990] 1 MLJ 83; [1990] 1 CLJ 429; [1990] 1 CLJ Rep 301, SC (refd)

Legislation referred to

Bills of Exchange Act 1949 ss 85, 95
Civil Law Act 1956 s 12
Companies Regulations 1966 Forms 9, 24, 44, 49

Rabinder Singh (Fernandez Selvarajah and Anisah with him) (Rabinder Budiman & Assoc) for the plaintiff.
Lau Kee Sern (Lim Peng with him) (Shook Lin & Bok) for the defendant.

Rozana Ali JC:

INTRODUCTION

[1] The plaintiff's claim against the defendant is founded on the tort of conversion for damages amounting to RM1,179,997.47; and in the alternative, for money had and received for the similar amount; interest and

cost herein.

BACKGROUND FACTS

[2] The plaintiff is a private limited company dealing with the production of animal feed amongst others, and the defendant is a commercial bank.

[3] The plaintiff drew two Maybank Bhd cheques, namely cheque No MBB652232 dated 1 September 2011 for RM740,846.55 ('first cheque') and cheque No MBB652281 dated 1 October 2011 for RM439,150.92 ('second cheque') in favour of Ultimate Palms Sdn Bhd ('UPSB') as payment for the three invoices issued by UPSB for the supply of red palm oil. The two cheques were then posted to UPSB business address at 1101, Block C, Kelana Business Centre, No 97, Jalan SS 7/2 Kelana Jaya, 47301 Petaling Jaya Selangor.

[4] On 7 October 2011 an account was opened at the defendant's branch in Shah Alam Selangor under the name of UPSB ('UPSB account'). The first cheque was handed for collection by the defendant on the same date and the UPSB account was credited with the proceeds of the first cheque. On 11 October 2011 the second cheque was similarly handed for collection by the defendant and the proceeds was also credited in the UPSB account. Subsequently the proceeds of both cheques was withdrawn from the UPSB account and as at 2 February 2016 the remaining balance was only RM558.87. However, neither the two cheques nor the monies from the proceeds of the two cheques collected by the defendant went to UPSB.

WITNESSES

[5] The witnesses are:

PW1	Goh Kee Seng	Managing director of the plaintiff
PW2	Lim Kim Hua	Company secretary of UPSB
PW3	Aini Aishida bt Anuar	Police inspector, IPD Shah Alam
PW4	Tee Lip Sin	Director of UPSB
DW1	Mohd Suruwan bin Sitam	Senior executive of the defendant
DW2	Abdul Latif bin Mohd Tahir	Branch manager of the defendant

PARTIES SUBMISSIONS

[6] The plaintiff submitted that it is the true owner of the two cheques

drawn in favour of UPSB and it has a valid cause of action against the defendant. The defendant acting in bad faith and/or negligently facilitated unauthorised of opening of the UPSB account by persons unknown to the plaintiff or UPSB. The defendant had wrongfully converted the two cheques to their own used and depriving the plaintiff thereof resulting in the plaintiff's loss in the amount of the two cheques. Alternatively, the plaintiff submitted that the amount of the two cheques are payable to the plaintiff by the defendant as money had and received by the defendant to the plaintiff's used. The defendant had failed and/or neglected to act in good faith and/or acted with negligence in failing to properly verify all relevant supporting documents in accordance with standard banking practice in facilitating the opening of the UPSB account. Thus the defendant is liable for conversion and not entitled to rely on the statutory defence of s 85 of the Bills of Exchange Act 1949 ('the BEA').

[7] The defendant on the other hand submitted that it relied on the UPSB documents when facilitating the opening of UPSB account. The authenticity of the said documents was never disputed by the plaintiff during the trial. The proceeds of the two cheques were at no material time being used by the defendant for its benefits. Since the defendant at all material times acted in good faith and/or without negligence and in the absence of any breach of any standard banking rules or practice, the defendant is entitled to a complete defence as provided under s 85 of the BEA. Alternatively, if there was negligence the defendant relied on s 12 of the Civil Law Act 1956 and contended that the loss and damage claimed was caused or contributed by the plaintiff.

ISSUES TO BE TRIED

[8] The issues submitted by both parties are as follows:

(a) whether the plaintiff is the true owner of the two cheques;

(b) whether the defendant had assisted or otherwise cohered with one Tee Lip Sin in the opening of UPSB account using false documents;

(c) whether the defendant at all material time had acted in good faith in the opening of USPB account;

(d) whether the defendant had wrongfully credited the two cheques for its' own use and benefit and eventually had caused the plaintiff suffered loss; and

(e) whether the defendant is liable to the plaintiff in respect of the losses suffered.

A FINDINGS

[9] With reference to the respective submissions filed, counsel for both parties agreed on the five principal issues or areas for determination by this court. I, however, find that the issues to be decided is whether the defendant was negligent in opening of the UPSB account that had resulted in loss to the plaintiff and whether the defendant is entitled to a complete defence under s 85 of the BEA.

[10] In law, the true owner of a cheque is the person who has possession or an immediate right of possession to the cheque. In the circumstances of this case since there had been no delivery of the two cheques to the payee, the plaintiff, therefore, remained as the true owner and is entitled to maintain the action. In *United Malayan Banking Corp Bhd v Kek Tek Huat (deceased) (Kik Chon Lam & Ors, executors of the estate of Kek Tek Huat)* [1990] 1 MLJ 83; [1990] 1 CLJ 429; [1990] 1 CLJ Rep 301 (SC) the Supreme Court had considered the following authoritative statement in *Paget's Law of Banking* (9th Ed) for the definition of who is the true owner of a cheque:

> The true owner of a cheque must be the party with an unassailable title to it whether in possession of it or not, for the reason that a cheque is a negotiable instrument. ...
>
> At the time the cheque is issued either the drawer or the payee is the true owner, the payee if he has not come by the cheque fraudulently and the drawer if the payee has been fraudulent;

[11] In *The official assignee of the property of Loh Chuk Poh, a bankrupt v The Oversea Chinese Bank Limited* [1934] 1 MLJ 76 the Court of Appeal stated the following:

> The true owner of a cheque and of its proceeds must be one and the same person. When the cheque passes and is cashed, its true owner is the person who gave value and he is the true owner of the proceeds. The cheque in the case has not been negotiated. The true owner therefore is the person who draws it, by himself or his agent, on an account which belongs to him.

See also *Oriental Bank of Malaya v Rubber Industry (Replanting) Board* [1957] 1 MLJ 153; [1957] 1 LNS 50.

[12] The evidence showed that the drawer of the two cheques and that the payee for both cheques was UPSB. There is also evidence that UPSB as payee never received the two cheques. In fact UPSB wrote to the plaintiff via a letter dated 24 October 2011 stating that they do not have the two cheques credited into their account. The plaintiff was sued by UPSB in Civil Suit No 22-NCVC-823–06 of 2012 claiming that it had not received payment

from the plaintiff for three invoices and judgment was entered against the plaintiff in that suit. On this evidence, I find that the plaintiff is the true owner of the two cheques.

[13] The plaintiff submits that the defendant had not acted in good faith and was negligent in their action when facilitating the opening of UPSB account. This can be seen where the resolution by the UPSB Board have two different dates where the date on the top is 26 September 2011 whereas at the bottom it is dated 11 October 2011. The latter date being a date after the UPSB account had been opened which is on 7 September 2011. Another instance is where UPSB does not have any relationship with the two introducers. By allowing a business entity and an individual to act as introducers without verifying their relationship with UPSB, the defendant had failed in its responsibility to verify the identity and credibility of the introducers.

[14] The plaintiff also submitted that there was gross negligence on the part of the defendant when it allowed the UPSB account to be opened based on documents that were highly suspect and which ought to have put the defendant on notice that a heightened scrutiny has to be exercised by the defendant before approving the opening of the UPSB account. It is clear that the defendant did not act in good faith and had acted negligently thereby depriving it of the protection of the statutory defence under s 85 of the BEA.

[15] I am mindful that s 85 of the BEA provides a statutory defence to collecting banks in respect of claim made by true owners of cheques, whether brought in conversion or for money had and received. Section 85 of the BEA relieves a collecting bank from liability provided that the bank discharges its burden in proving that the bank had acted in good faith and without negligence. In order to be entitled to this defence, the defendant has to prove that it acted in good faith and that it was not negligence.

[16] In *Affin Bank Bhd v Successcom Enterprise Sdn Bhd* [2009] 1 MLJ 36 where the Court of Appeal states that:

> Section 85 provides a statutory defence to collecting banks in respect of claim made by true owners of cheques, whether brought in conversion or for money had and received. Section 85 of the Act relieves a collecting bank from liability provided that the bank discharges its burden in proving that the bank had acted in good faith and without negligence ...

[17] I am reminded that the onus of proving good faith and without negligence is on the defendant. In *Anika Insurance Brokers Sdn Bhd & Anor v Public Bank Bhd* [2004] 6 MLJ 268 where the court held that:

> The defendant has consistently maintained that they acted in good faith and without negligence and the onus of proving so, falls on them.

[18] In *Magna Prima Bhd & Ors v Top Green Entity Sdn Bhd & Ors* [2013] 8 MLJ 447, referred to the principles in *Indian Overseas Bank v Industrial Chain Concern* 1989 SCR Supl (2) 27; 1990 SCC (1) 484 on the standard of care to be taken by a bank in opening an account:

> Before opening an account for a customer who is not already known to him, a banker should make proper preliminary inquiries. In particular, he should obtain references from responsible persons with regard to the identity, integrity and reliability of the proposed customer.
>
> If a banker does not act prudently and in accordance with current banking practice when obtaining references concerning a proposed customer, he may later have cause for regret.
>
> The 12th defendant did not counter-check with the plaintiffs when he received the new set of instructions. He was also not suspicious that such a large amount of money was being transferred. As a bank officer, he must act prudently and exercise great skill and care.

[19] It is crucial that the defendant's act must be done in good faith before s 85 of the BEA can be invoked. In determining good faith, s 95 of the Act stipulates that a thing is deemed to be done in good faith where it is in fact done honestly whether it is done negligently or not. In order to establish that the defendant was not negligent, the defendant needs to establish that the defendant has taken reasonable care to refrain from taking any such step which the defendant foresees is, or ought reasonably to have foreseen was, likely to cause loss or damage to the true owner.

[20] From the evidence, the application for the opening of the current account was supported by the following documents where their authenticity was not disputed:

(a) an original certified true copy of the memorandum and articles of association of UPSB;

(b) an original certified true copy of the Form 9 of UPSB;

(c) an original certified true copy of the Form 44 of UPSB;

(d) an original certified true copy of the Form 49 of UPSB;

(e) an original certified true copy of the Form 24 of UPSB;

(f) an original certified true copy of the director's resolution of UPSB;

(g) an original temporary identity card of Tee Lip Sin, a director of UPSB;

(h) an original international passport of Tee Lip Sin; and

(i) an original certified true copy of the identity card of Tee Cheng Hua, the other director of UPSB.

[21] When a bank opens an account for a customer, it is under a duty to verify the customer's identity. It has to obtain satisfactory references to establish the customer's identity and trustworthiness. In other words, the defendant will only be liable if he had failed to verify the customer's identity. In this present case, the person who applied for the opening of the current account was one Tee Lip Sin, a director of UPSB. His original temporary identity card and international passport, together with the photographs were presented to the defendant to facilitate the process. The plaintiff contended that the defendant should not accepted the temporary IC since it was not machine readable and My Card should be taken for verification. The plaintiff also contended that the signature page of the passport was not photocopied or kept by the defendant. At this juncture, I am of the view that the temporary IC and the passport are legal and acceptable documents for identification were sufficient for the purpose of opening the account. Furthermore, the authenticity of the temporary IC and the passport were also not disputed and there was no evidence to suggest that it were forged document. The absence of the signature page is immaterial since the account opening form and the specimen signature card were both signed by Tee Lip Sin in the presence of the DW1.

[22] From the evidence, it reveals that the defendant also took steps to examine the UPSB resolution by citing the original certified true copy of the resolution by one Lim King Hua, the company secretary and the authenticity was not disputed. In fact DW1 had reasonably verified the resolution with the company secretary and recorded the event on the reverse side of the Form 49. Even though there are two different dates stated on the resolution but DW1 had personally verified with the company secretary by phone upon obtaining the number from Tee Lip Sin. Therefore, I am of the view that the defendant had taken reasonable steps to verify the document and upon relying the information given by Tee Lip Sin there should not be any reasonable suspicion as to the authenticity of the resolution.

[23] On the plaintiff's contention that the identification of the second director of UPSB, one Teh Cheng Hua, in respect of his identification number differs from what is stated on the his passport. Here, I took cognisance that Tee Lip Sin was the only authorised signatory to deal with the UPSB account. There was no requirement as part of the banking practice for a non-signatory to be present for the opening of the account. On this score, I find that the issue raised by the plaintiff in respect of Teh Cheng Hua is not material in relation to

opening of the UPSB account.

[24] On the plaintiff's contention that the defendant failed to verify the identity, and credibility of the introducers to ensure there exist a relationship between UPSB have resulted a gross dereliction of duty that demonstrate a serious lack of good faith and/or negligence on the part of the defendant. I referred to the 'Account Opening Application Form' whereby its stated the relationship of the introducers as a 'person' known by UPSB. In fact DW1 himself contacted and verified such relationship and was recorded on it. Therefore, I find that DW1 had obtained satisfactory references to establish the introducer's identity and trustworthiness.

[25] From the evidence, it also reveals that the defendant had adopted the processes in verifying the identity of the UPSB and all documents related to such identity was certified and signed by UPSB's company secretaries. Furthermore, Tee Lip Sin had established himself as one of the Director of UPSB authorised to open an account and there is no suspicion as to his identity that he is Tee Lip Sin himself. In other words, with the documents presented, the defendant had no reason to suspect that Tee Lip Sin was an imposter. I am of the considered view that there is no need of further inquiries beyond the standard of reasonable care of the banking practices and procedures.

[26] As to the plaintiff's claims for conversion, the law on this area was fairly settled. As affirmed by the Supreme Court in *United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd* [1993] 1 MLJ 182; [1993] 2 CLJ 31, the liability of a banker in common law is found on the tort of conversion, which is a tort of strict liability. A banker who pays out on a forged instrument drawn on the customer's account is absolutely liable to make good the loss. The forged instrument is a nullity and the banker has no authority, actual or implied from his customer to act on it. In this present case, the two cheques were not a forged document and were issued in the name of UPSB and were cleared for payment by the paying bank with proceeds collected by the defendant. There was nothing to alert defendant that UPSB is not the payee or rightful owner of the two cheques and had no knowledge that the UPSB account was opened by a customer who had no authority to do so. Furthermore all other documents in support presented for the opening of UPSB account were not disputed as to their authenticity and originality. There is also no evidence that the defendant had converted the two cheques to its use and wrongfully deprived the plaintiff of the same. Therefore, I find that the plaintiff is not entitled for damages in compensation for the tort of conversion.

[27] As to the plaintiff's claim for money had and received, the question to

be determined is — has the defendant received the plaintiff's money under such circumstances that natural justice and equity would require a refund? The defendant is regarded in law as having received the money to the use of the plaintiff and the law implies a promise on the defendant's part, or imposes an obligation upon him, on the principle that he has unjustly benefited, to pay it to the plaintiff. A person should be prevented from retaining the money derived from another which it is against conscience that he should keep (see *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1942] 2 All ER 122).

[28] Having reviewed the evidences, I find that the plaintiff has not established in evidence that the defendant had, or could have had, any knowledge whatsoever as to the fraudulent means in the opening the current account and the withdrawal of the monies from the said account. In the absence of knowledge on the part of the defendant, natural justice and equity would not require the defendant to refund the plaintiff. Parties cannot be restored to their original position by the defendant refunding the plaintiff. Due to the fraud perpetrated by the imposter of Tee Lip Sin, the benefit of the fraud committed has passed to the imposter. Requiring the defendant to compensate the plaintiff now would be unjust to the defendant and I also concluded that the defendant has not been unjustly enriched at the expense of the plaintiff. For these reasons, I find that the plaintiff has also not made out its claim in moneys had and received, and accordingly the claim also fails and therefore the defendant need not make the refund to the plaintiff.

[29] The other related issue to be decided is about the contributory negligence. It is trite law that contributory negligence and particulars of the same must be specifically pleaded in the defence in order for the defendant to rely on it — see *Hamizan bin Abd Hamid v Wong Kok Keong & Anor* [1994] 3 MLJ 630. Although the defendant had contended that it entitled to a statutory defence under s 12 of the Civil Law Act 1956 since the alleged loss and damage was contributed by the plaintiff for not having made payment to UPSB according to the mode of payment as stated in the invoices, I find that the failure to particularise the contributory negligence would be fatal.

[30] Applying to the principle of law to the facts of the case, I on the balance of probabilities finds that the defendant had discharged it burden in proving that it had acted in good faith and without negligence and therefore is entitled to a complete defence under s 85 of the BEA. For the reasons mentioned above, and having heard the evidences before me and submissions from both learned counsel and after having given much consideration, I find that the plaintiff's

A claim against of the defendant is dismissed with costs of RM20,000.

Plaintiff's claim dismissed with costs of RM20,000.

Reported by Dzulqarnain Ab Fatar

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